IN THE HIGH COURT OF UTTARANCHAT NAINITAL

Criminal Appeal No. 529 of 2001
(Old No. 2811 of 1984)

1. Nabi Shan **(Since deceased)**
   S/o Daraoo,
   P.S. Kichha,
   District Nainital. (Now U.S. Nagar)
2. Nanhe S/o Sri Jamat Ali
   R/o Harerpur, P.S. Baheri,
   District Bareilly,
   At present R/o Daraoo, P.S. Kichha,
   District Nainital. (Now U.S. Nagar)
3. Laik S/o Sri Chotte
   R/o Tandachhanga,
   P.S. Shisgarh, District Bareilly.
4. Yamin S/o Sri Kallan
   R/o Daraoo, P.S. Kichha,
   District Nainital. (Now U.S. Nagar)

…… …. Appellants

Versus

The State ……. Respondent

Ms. D.C.S. Rawat, (Amicus Curiae) for the appellants.
Mr. G.S. Sandhu, learned A.G.A. for the respondent State.

Hon'ble Prafulla C. Pant, J.

This criminal appeal, preferred under Section 374(2) of the code of Criminal Procedure, 1973 (for brevity hereinafter referred as Cr.P.C.), is directed against the judgment and order dated 25.09.1984, passed by learned Additional Sessions Judge (Special Judge), Nainital, in Sessions Trial No. 135 of 1983, S.T. No. 136 of 1083, S.T. No. 137 of 1983, S.T. No. 138 of 1983 and S.T. No. 139 of 1083, whereby appellants Nabi Shah, Nanhe, Laik and Yamin have been convicted relating to offences punishable

Under Section 399 and 402 of the Indian Penal Code, 1860 (for brevity hereinafter referred as I.P.C.), and that of offence punishable under Section 25 of the Arms Act, 1959. Each of the appellant has been sentenced by the trial court to rigorous imprisonment for four years under Section 399 of I.P.C., rigorous imprisonment for a period of four years under Section 402 of I.P.C., and rigorous imprisonment for a period of two years under Section 25 of the Arms Act, 1959. All the sentences are directed by the trial court to run concurrently.

2) Heard learned Amicus Curiae appointed on behalf of the appellant and learned A.G.A for the State.

3) Prosecution story, in brief, is that on 02.02.1983, at about 7:00 P.M., an information was received by the police of police station Kichha that an armed gang of dacoits is making preparation for committing dacoity in the house of Shankar Singh, resident of Pulbhatta, Police station Kichha. On receiving the information, Station House Officer, Mr. B.K. Juyal, procured witnesses P.W. 1 Gurbachan Singh and P.W. 3 Bariyam Singh, both resident of Pulbhatta, police station Kichha. Thereafter, police party proceeded, at 9:40 P.M., along with witnesses towards Pulbhatta. The policemen got divided into three groups, one headed by Station Officer B.K. Juyal, another headed by P.W. 2 Sub Inspector Dharmesh Kumar, and the third headed by Sub Inspector B.S. Negi. Each Sub Inspector was accompanied with the constables. They went towards house of Shankar Singh. At about, 11:15 P.M., some six dacoits with covered faces, were talking among themselves, under a

tree, that they have to commit robbery in that night in the house of Shankar Singh. On hearing this, the alleged dacoits were challenged by the police party. One shot was fired from the side of dacoits and another from the side of the police. However, no one was injured in the cross firing. Out of the six dacoits, four were arrested at the spot, by the police, who disclosed their names as Nabi Shah, Nanhe, Laik and Yamin (all the four appellants). On the search of the appellants, un-licensed country made single barrel gun (Ext. 1) with 08 live cartridges, was recovered from appellant Nabi Shah. One un-licensed double barrel gun (Ext/ 3) with 12 live cartridges, was recovered from appellant Nanhe. Appellant Yamin was found in possession of a small gun (Ext. 6) and 03 live cartridges; and from the possession of appellant Laik, on country made pistol (Ext. 8) with 03 live cartridges, was recovered. A recovery memo (Ext. A –1) was prepared by the police, at the spot, and on its basis, a First Information Report (Ext. A –3) was lodged on 03.02.1983, at about 3:10 A.M. The investigation was conducted by P.W. 5 Sub Inspector K.P. Dikshit. After completion of the investigation, and obtaining sanction from the District Magistrate to prosecute the accused, relating to offence punishable under Section 25 of the Arms Act, 1959, charge sheets were submitted against the accused persons, for their trial, in respect of the offences punishable under Section 307, 399 and 402 of I.P.C. and also the one relating to offence punishable under Section 25 of the Arms Act, 1959.

4) On receipt of the charge sheets, it appears that the Magistrate, after giving necessary copies to the accused

Persons, as required under section 207 of the Cr.P.C., committed the case relating to offences punishable under Section 307, 399 and 402 of I.P.C., to the court of Sessions, and thereafter, since, the charge sheets relating to offence punishable under Section 25 of the Arms Act, were connected with the aforesaid charge sheet, as such cases relating there to were also committed to the court of Sessions, for trial. The trial court, after hearing the prosecution and the defence, framed charge of offences punishable under Section 399, 402 of I.P.C., against all the four accused / appellants. All the five session trials were consolidated and evidence was recorded in Session Trial No. 135 of 1983. Since, the accused persons pleaded not guilty, and claimed to be tried, prosecution got examined P.W. 1 Gubrachan Singh; P.W. 12 Sub Inspector Dharmesh Kumar; P.W. 3 Bariyam Singh, P.W. 4 Constable Yashpal Sharma and P.W. 5 Sub Inspector K.P. Dikshit (the Investigating Officer). The evidence was put to the accused persons, under Section 313 of Cr.P.C., in reply to which they alleged that they have been falsely implicated in the crime due to enmity, by the police. However, after hearing the parties, the trial court found all the four accused guilty of charge of offences punishable under Section 399 and 402 of I.P.C., and that of offence punishable under Section 25 of the Arms Act, 1959. After hearing on sentence, the trial court sentenced each one of the accused / appellant to rigorous imprisonment for four years under Section 399 of I.P.C.,; rigorous imprisonment for four years under Section 402 of I.P.C., and rigorous imprisonment for a period of two years under Section 25 of the Arms Act.

Aggrieved by said judgment and order dated 25.09.1984, this appeal was preferred by the convict, before the Allahabad High Court in the year 1984, from where it has been received by transfer to this Court, under Section 35 of the U.P. Re-organization Act, 2000, for its disposal.

5) Before further discussion, it is pertinent to mention here that appellant Nabi Shah is reported to have died during the pendency of appeal, as such, his appeal stands abated.

6) Learned Amicus Curiae on behalf of the appellants argued that the trial court has erred in law by convicting the appellants in the case, as the prosecution story, as narrated by the witnesses, cannot be believed. In this connection, it is contended that it is strange to believe that the dacoits, who were caught by the policemen, did not resist their arrest, nor did they use the firearms. The one shot which is said to have been fired still remained un-explained as to by whom it was fired from the side of the dacoits and at whom it was aimed. After going through the evidence on record, this Court is of the view that the argument advanced by learned Amicus Curiae, has substance and it is hard to believe that when all the miscreants were armed with deadly weapons, why they would not resist their arrest and would not fire to make their escape good. This creates reasonable doubt in the prosecution story, as narrated by the witnesses.

7) On behalf of the appellants, it is also argued that from the recovery memo and the evidence of the witnesses, it is clear that belt containing cartridges was also recovered

from the accused, but the same was never produced before the trial court. In this connection, it is further contended that the trial court has erred in law in ignoring said fact. This Court is of the view that in the circumstances of the present case, where out of 18 policemen, only one policemen was produced as eyewitness. Such lapse of not producing the belt of cartridges recovered from the dacoits, becomes material to create reasonable doubt in the prosecution story.

8) Not only this, there are contradictions in the statement of the witnesses, which are pointed out on behalf of the appellants, before this Court. P.W. 1 Gurbachan Singh has stated in his cross-examination that no one living near the place of incident, turned up at the time of the incident, While, P.W. 3 Bariyam Singh says that some 50 persons assembled there, soon after the incident. There is yet another contradiction on the record. P.W. 2 Sub Inspector Dharmesh Kumar and P.W. 3 Bariyam Singh say that gun (Ext. 1) was recovered from Laik, while P.W. 1 Gurbachan Singh says, the same was recovered from Yamin. This is a material contradiction, which cannot be ignored. Reading of all the contradictions, in the light of the lapses in the prosecution evidence, as discussed earlier, in the opinion of this Court, it cannot be said that the charge stood proved against the accused / appellants, beyond reasonable doubt, and as such, the appellants are entitled to the benefit of reasonable doubt.

9) Accordingly, the appeal deserves to be allowed. The same is allowed. Conviction and sentence, awarded against

the appellants by the trial court, under Section 399, 402 of I.P.C. and that on under Section 25 of the Arms Act, is set aside. Appellant No. 2 nanhe, appellant No. 3 Laik and appellant No. 4 Yamin are acquitted of the charge. They are on bail. Their bail bonds are cancelled and sureties are discharged. The need not to surrender. (Appeal of appellant No. 1 Nabi Shah, in view of his death during the pendency of this appeal, stands abated).

(Prafulla C. Pant, J.)

Dt. October 28, 2006.
H. Negi